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FILED
OCT 13 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 44

J. B. BEAN and 63 OTHERS, *Petitioners*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

THEODORE ANDRESS
El Paso, Texas

THURMAN ARNOLD
Washington, D. C.

W. MORGAN HUNTER
Austin, Texas
Attorneys for Petitioners

Of Counsel:

ANDRESS, LIPSCOMB, PETICOLAS & FISK
ARNOLD, FORTAS & PORTER
POWELL, RAUHUT, McGINNIS & REAVLEY

October, 1958

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May It Please The Court:

Petitioners, J. B. Bean and the 63 other individuals named in the Petition in the Court of Claims, would respectfully show the Court the following:

A. OPINION BELOW

The opinion of the Court of Claims is reported in _____ C.Cls. _____, at page 319 of the record, and in the Appendix to this Petition beginning at page A27 hereof.

B. STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered July 16, 1958. No rehearing has been sought. The jurisdiction of this Court is invoked under Section 1255 (1) of the Judiciary Code, 28 U.S.C.A. § 1255 (1).

C. QUESTIONS PRESENTED

By statutes and judicial decisions, most of the Western states have developed a body of jurisprudence whereunder a right to use water for irrigation is (a) a vested right of real property, (b) appurtenant to the land actually irrigated, (c) based upon actual beneficial use of water within the terms of (d) a State Notice or Permit to Appropriate. Section 8 of the Reclamation Act of 1902 adopts this Doctrine of Prior Appropriation as a part of the Reclamation Laws, specifically prescribing that the right to use water delivered through reclamation facilities is appurtenant to the land irrigated, based upon the actual beneficial use of water and acquired according to state law. This Court has reinforced the statute by express holdings that the Government is only a storer and carrier of water delivered through reclamation facilities, the right to the use of the water being the vested real property of the landowners, and that the Secretary of the Interior has no power to limit such appropriative water rights by contract.

By the Warren Act of 1911 Congress authorized the Secretary of the Interior to contract for the carriage of water through reclamation facilities to lands

"outside" reclamation projects. The court below held that the Warren Act prohibits the perfection of appropriative water rights, as appurtenances to their lands, by citizens whose farms are irrigated with water so delivered.

The issue here presented then is this: By beneficial use of waters delivered under Warren Act contracts are appropriative water rights perfected as appurtenances to the land so irrigated? Or are the farmers of such lands, unlike all other irrigators in the West, mere third party beneficiaries of contracts, necessarily inferior to all users under the Reclamation project, regardless of priority of use?

D. STATUTES INVOLVED

The statutes involved are Section 8 of the Reclamation Act of 1902, 32 STAT. 390; and Sections 1 and 2 of the Warren Act of 1911, 36 STAT. 925. These statutes are set forth in the Appendix to this Petition beginning at page A 23.

E. STATEMENT OF THE CASE

For convenience we will refer to petitioners as "plaintiffs," and to respondent as "defendant."

Plaintiffs are all landowners and water users on lands located within the municipal limits of Hudspeth County Conservation and Reclamation District No. 1 (herein called "Hudspeth District"), an irrigation district in the extreme westerly end of Texas.

Irrigation from the Rio Grande River commenced within what is now the Hudspeth District in the

1880's. The irrigated acreage gradually increased until 1924 when 8,964 acres were irrigated. At that time the District was organized and entered into the Warren Act contract with the Government.

For the next 26 years the Government diverted irrigation water from the river and delivered it to the plaintiffs through operation of the irrigation works of the Rio Grande Reclamation Project. These were the very irrigation works described in Notices of Intent to Appropriate filed by Reclamation officials in 1906 and 1908, and use on Hudspeth lands of water diverted under authority of such Notices was squarely within the literal terms thereof.

By 1928, 13,590 acres were irrigated within Hudspeth District, and by 1950, 17,329 acres. The Plaintiffs and their neighbors by then had expended literally millions of dollars in reclaiming their farms from the desert, and quite literally a prosperous garden bloomed there in the desert along the Rio Grande.

Beginning in 1951 the Government, acting through the Bureau of Reclamation, cut off the flow of water to the Hudspeth District and to the plaintiffs in order to divert all available waters of the river to other uses under the Rio Grande Reclamation Project, including irrigation of lands first irrigated long after the plaintiffs' lands were first irrigated.

In *Hudspeth District v. Robbins*, 213 F. 2d 425 (CA 5 1954) cert. denied, 348 U.S. 833; and *Miller v. Jennings*, 243 F. 2d 157 (CA 5 1957), cert. denied, 355 U.S. 827, the Hudspeth landowners vainly sought specific ajudications of their water rights and

injunctions against interferrence with their rights by the Reclamation officials. In both cases the representatives of the Government argued successfully that the United States was an indispensable party and that it had not consented to be sued. Consequently both of these cases were dismissed for lack of jurisdiction.

The plaintiffs thereupon sought compensation in the Court of Claims on authority of *Gerlach Livestock Co. v. United States*, 339 U.S. 725 (1950). There as here the Reclamation Bureau cut off the plaintiff landowners' water supply in order to divert such water to other uses under a federal Reclamation project. The Court held that such plaintiffs were entitled to compensation under the Fifth amendment for such a taking.

The Government did not deny its seizure of the waters which had been used by the Hudspeth landowners for a generation prior to 1951, but moved for summary judgment on the ground that the plaintiffs never acquired property rights to the continued use of their water supply. The Court of Claims granted the Government's motion.

G. JURISDICTION OF THE UNITED STATES COURT OF CLAIMS

This suit is founded on the Fifth Amendment to the Constitution of the United States, the plaintiffs seeking compensation for the taking of property. Jurisdiction is conferred upon the Court of Claims by Section 1491 of the Judiciary Code, 28 U.S.C.A § 1491.

H. REASONS FOR ALLOWANCE OF THE WRIT

1. Appropriative water rights must be appurtenant to specific lands. They must be based upon, measured by, and limited to actual beneficial use of water, and the first in time is the first in right.

The Arid Region Doctrine of Prior Appropriation of water, peculiar to the states in the western half of this country, has its origins in the California gold fields during the turbulent period of the gold rush. Impelled by the stern realities of pioneer life in the arid region, the miner's custom of prior appropriation was formalized by statute, was enforced by the courts and spread rapidly through the western half of the Union. By the turn of the century all of the states and territories to which the Reclamation Act now applies had formerly adopted the doctrine of prior apropriation, either alone or in conjunction with the common law of riparian doctrine.

The conventional language in the arid regions to express the appropriative doctrine is that set forth in the Texas statute:

> "Such [beneficial] use shall be the basis, the measure and the limit to the right to use water * * *." (Article 7542, Tex. RCS)

This means: That an appropriative right to use water can be perfected as a vested property right only by actually using water for irrigation or an-

other beneficial purpose; the owner of an appropriative water right may take and use as much water as is necessary for his beneficial purpose; but no more.

A fundamental and necessary incident to the doctrine of prior appropriation is a principle of priority, which is expressed in the Texas statute thus:

> "As between appropriators, the first in time is the first in right * * *." (Article 7472, Tex. RCS)

Thus, the senior appropriator may use as much water as he needs for his beneficial purpose, but no more. If more water is available, the second most senior may use what he needs, but no more; if still more water is available, the third most senior may take, and so on. In times of shortage the most junior appropriators are cut off.

At an early date the western states and territories began to prescribe procedural rules for the satisfactory operation of the appropriation doctrine. Various states adopted recordation statutes making the filing with some public officer of a "Notice of Intent to Appropriate" a prerequisite to acquisition of an apropriative right. When perfected by actual beneficial use of water, the appropriative right "relates back" to the date of filing of the Notice. The Texas Irrigation Act of 1889 and New Mexico Act of 1905 are examples of such notice of statutes.

One other aspect of the Arid Region Doctrine of Prior Appropriation must be emphasized: The fundamental proposition that in most of the Western States, including Texas, an appropriative right to

use the water for irrigation is an appurtenance to the land irrigated; the water right is owned by the landowner and not by the permittee, or the ditch-owner. Article 7473, 7559; *cf. Lakeside Irrigation Co. v. Markham Irrigation Co.*, 116 Tex. 65, 285 S. W. 593 (1926). The irrigation projects of the 19th century were, of course, mainly private promotions, and the sponsoring canal company or subdivider would initiate the appropriation and construct and control the distribution system. The settlers were often dismayed to discover, belatedly, that the canal companies both could and would demand what the settlers thought were extortionate charges for delivering water, or even divert the water entirely to what the canal company found to be more profitable uses. To protect the settlers from overreaching by canal companies, the appurtenancy concept developed in Colorado in the 1880's. *Wheeler v. Northern Colo. Irr. Co.*, 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603 (1888); *Wyatt v. Larimer Irr. Co.*, 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280 (1893). By statute or by constitutional amendment or by judicial construction the appurtenancy concept spread throughout the non-coastal Western States during the next few years. Wiel, Water Rights in the Western States (3d ed. 1911) sec. 1338 et seq. As stated in *Farmers Irr. District v. Frank*, 72 Neb. 136, 100 N.W. 286 (1904):

> "There are two conflicting ideas upon which the laws of the several states and territories relating to the use of waters for the purposes or irrigation are based. One is that any person or

> individual may appropriate surplus waters which have not theretofore been appropriated, and may use the same to irrigate such lands as he may see fit. * * * This system tends to breed monopolies, and to lead to antagonisms and to strife and dissension. Since the land in arid regions is useless for the purpose of agriculture unless water is applied to it, this doctrine makes the landowner dependent upon the owner of the water right, and leads to gross exactions and abuses. The doctrine of * * * ownership of water for irrigation purposes, disassociated from the land to which it is designed to be applied, has been proved by long experience to be detrimental to the public welfare. * * * The other doctrine is that the right to use the water should never be separated from the land to which it is to be applied. 'Where this doctrine prevails, canals and ditches become, like railroads, great semi-public utilities, means of conveyance of a public commodity, their owners entitled to adequate compensation for services rendered, but having no ownership in the property distributed.' "

These then were the fundamental tenets of the Appropriation Doctrine at the turn of the century. (1) The water right is based upon, measured by, and limited to actual beneficial use of water. (2) The first in time is the first in right, the perfected right relating back to the priority date determined under the state procedure. (3) The perfected water right belongs not to the ditchowner, but is appurtenant to the land irrigated.

2. The Reclamation Act incorporates the Doctrine of prior appropriation and directs that the perfected appropriative water rights shall be appurtenant to the land irrigated as the property of the landowner, the Government being merely a storer and carrier of the water.

It was against the foregoing background of substantive law in the West that Congress adopted the Reclamation Act of 1902, 32 STAT. 290, extending only to states adhering to the Appropriation Doctrine. Section 8 of the Reclamation Act provides quite specifically as follows:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use of distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *; *Provided*, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right."

Congress thus made it crystal clear that in developing Reclamation projects reclamation officials should proceed in accordance with the applicable state or territorial procedure, that water rights should be acquired under state appropriation laws, that water rights perfected under state law by actual

beneficial use of water should be appurtenant to the land irrigated and could not be held in gross by the Government, and that such appurtenant water rights should, pursuant to the arid-region doctrine of prior appropriation, be based upon, measured by and limited to the landowner's beneficial use.

Officers of the Federal Reclamation Bureau from time to time feel these statutory directions to be onerous, but the courts consistently hold that the statute does indeed give the individual citizen judicially cognizable rights as against his Government.

For example: In the case of the Yakima Reclamation Project, the Secretary filed Notices of Intent to Appropriate in conformity with the law of the State of Washington and entered into contracts to deliver water to the individual land owners, the landowners agreeing that the Reclamation Officers might limit the deliveries in their administrative discretion. After years of delivering to the farmers all the water they could beneficially use, the Secretary sought to exercise his contracted power to limit the deliveries. The landowners sued for injunction.

The Secretary's first defense was that the United States was an indispensable party. He argued that the Government was the owner of the water rights; that the landowners had no vested property rights as to the use of water, but only contract rights based upon their contracts with the Government; that the landowners' suit was, in substance, for specific performance against the Government, which had not consented to be sued.

In *Ickes v. Fox*, 300 U.S. 82 (1937), this Court analyzed the case as presenting the issue of whether

the landowners sought to enforce contract rights (in which case the Government was indispensable), or whether they sought to protect property rights (in which case the Government was not an indispensable party). In rejecting the Secretary's contention and holding the action might proceed, the Court emphasized that the landowners were the owners of the water rights:

> "The fallacy of the contention is apparent because the thus far undenied allegations of the bill, * * * demonstrate that * * * [the landowners'] water rights have become vested; and that ownership is in them and not in the United States.
>
> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights * * * *."

In the same opinion, the Court had explained:

> "Under the Reclamation Act, * * * as well as under the law of Washington, 'beneficial use' was the 'basis, the measure, and the limit of the right.' * * * Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of landowners, and by the terms of the law and of the use of landowners; and by the terms of the law and of the contract already referred to the water rights became the property of the landowners, wholly distinct from the property right of the

> government in the irrigation works. * * * The Government was and remained simply a carrier and distributor of the water * * *."

Ickes v. Fox was later reaffirmed by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), an original action for an equitable apportionment of the waters of the North Platte River. Following *Wyoming v. Colorado*, 259 U.S. 419 the Court made an apportionment between the states which was based almost entirely upon the respective priorities of the individual water users which the states represented parens patriae. The United States intervened to assert a claim that it owned all the unappropriated waters of the river as of the time it had constructed the Kendrick and North Platte Reclamation Projects in Wyoming and Nebraska. Following and quoting extensively from *Ickes v. Fox* the Court rejected this contention, pointing out (325 U.S. at 614):

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches, or canals. The water right is appurtenant to the land. * * *"

Thus the Congress and the Court have placed the Reclamation Bureau in precisely the same position as a private ditch company. The Reclamation Bureau may initiate the appropriation and construct and operate the irrigation works. But when all is said and done, the perfected water right belongs to the citizen, not to the Government. The Government has only the right to be paid for the irrigation works, it does not have the perpetual control of the use of the water.

The recognition of water rights as appurtenances to the land irrigated does not proscribe the orderly development or finance of an irrigation project. Like the private promoter, the Reclamation Bureau has a perfect right to determine to what lands it will deliver water **in the first instance.** It has no duty **ever** to **start** to deliver water to lands which cannot be economically irrigated or the owners of which refuse to enter into appropriate financing contracts. But the appurtenancy concept does prohibit the Indian giver or the contract for an Indian gift. Once the Reclamation Bureau delivers water to land for beneficial use, like the private promoter the Reclamation Bureau must accept the consequences of the law: That the right to use water for irrigation is appurtenant to the land irrigated, and beneficial use is the measure and the limit of the right.

3. The Court of Claims erred in construing the Warren Act as limiting water rights, rather than irrigation works.

If the Court below had followed Section 8 of the Reclamation Act, *Ickes v. Fox*, and *Nebraska v. Wyoming*, it would have overruled the Government's Motion for Summary Judgment, echoing *Fox v. Ickes*, 137 F. 2d 30, 33 (CADC, 1943):

> "Reading the Reclamation Act in light of the decision in Ickes v. Fox, we find the situation in this case to be as follows: The water rights of appellants are not determined by contract but by beneficial use. The Secretary * * * must distribute the available water ac-

cording to the priorities among the different users which are established by the law of the State * * *." 137 F. 2d at 33.

But the Court below held instead that the Warren Act directs that landowners have limited and inferior rights to the use of water.

Now what the Warren Act says is this:

> "Whenever * * * storage or carrying capacity * * * may be provided in excess of the requirements of ["Project lands"] * * * the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with * * * individuals, corporations, associations, and irrigation districts. * * *"

And section 2 further provides:

> "Provided, that nothing contained in this or the preceding section shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State."

The Court of Claims points to the language "preserving a first right to lands and entryman under the project" and concludes this directs contracts prescribing superior rights **to the use of water** for "project" landowners. We submit this language refers only to the **storage and carrying capacity of**

the irrigation works which may be the subject of Warren Act contracts: only the "excess capacity" may be contracted out. This distinction—as between "first rights" to water and "first rights" to carrying capacity—is vital where, as here, irrigation works are ample but water is short.

It will be recalled that under the Reclamation Act the Government, even as a private ditch company, is only a storer and carrier of water.

It will be further recalled that the "appurtenancy", concept was not novel in the Reclamation laws, but developed in the state courts and legislatures, in the decades immediately preceding the Reclamation Act and the Warren Act, to inhibit overreaching of settlers by canal companies and land development companies. Presumably, there was an even greater need, not a lesser need, to protect the settlers under Warren Act developments against abuses by private "individuals, corporations, associations and irrigation districts," than those under developments more tightly controlled by Federal officials. Indeed, the very type of abuse which the appurtenancy concept sought to mitigate is brilliantly exemplified in the Intra-Bureau memorandum of Reclamation Commissioner Mead of October 18, 1924, severely questioning the propriety of the 1924 Contract upon which the court below based its decision:

> "2. We do not fully understand the theory of law upon which the proposed contract is based * * * It is assumed that the lands within the [Hudspeth] district will be permanently developed with the thought that this contract provides for a permanent and substantial water

right. This is quite unlike any water contract here-to-fore made by the Government and seems to call for a careful consideration of its legal basis.

"* * *

"4. Also it is our understanding that lands within the district, having a value possibly of $10 an acre, are being sold to unsuspecting purchasers at from $100 to $150 per acre. If this be true, we would by approving this contract be aiding a land speculation of the worst character * * *." (Robbins Record 465)

However, upon reflection, Reclamation Commissioner Mead overcame his qualms and recommended the approval of the 1924 Contract for the reasons shown in his letter of November 19, 1924 to the Secretary:

"* * *. This water would be dumped into the river and lost to the project were it not utilized on lands in the Hudspeth district.

"The project would secure under such a contract an income of $30,000 or more a year, which would be lost if the water were turned into the river." (Robbins Record 460)

It is simply absurd to suppose that, by the Warren Act, Congress intended to authorize the Government, even for $30,000 per year of the profits, to "aid a land speculation of the worst character." If this is not clear enough from the bare bones of the statute, it is made positive by the legislative history of the Warren Act:

As it originally passed the Senate, the Warren Bill provided that, if he should find a part of the water supply of a Reclamation project might "be disposed of" to the advantage of the project, the Secretary might contract for the delivery of it. However, the House of Representatives made key changes in the language of the Bill, as indicated by the committee report presented by Congressman Reeder, who managed the Bill in the House:

> "* * * our changes have been made largely, if not entirely, with the idea of **not** establishing a system of selling water, but simply of permitting the impounding and carrying of the water **which is appurtenant to their lands** [i.e., the Warren Act lands]." 46 Cong. Rec. 2109 (1911), emphasis supplied.

The Warren Bill then went to conference, and the Senate joined in the changes proposed by the House. As explained by Congressman Reeder, who managed the Conference Bill in the House:

> "It [the Conference Bill] is to authorize contracts with outside parties, either private persons or corporations, so that they, by paying their proportionate per cent of the money required for building reservoirs and ditches, can carry the water **that belongs to their land** through those ditches.
>
> "* * * as it passed the Senate this bill provided for the disposition of water. The House Committee held that **Congress does not have**

the right to provide for the disposition of water; that water is appurtenant to the land, and that whoever by proper course secures the water for his land makes the water appurtenant to the land. Therefore, we changed the bill so as to provide for impounding and carrying the water, rather than for disposing of it. The Senate conferrees agreed with use on every proposition." (46 Cong. Rec. 2780-83)

With respect to relative rights to use of water carried under Warren Act contracts, Congressman Reeder was directly asked whether the doctrine of prior appropriation would prevail:

"Suppose there is a shortage of water in the end—who loses the water, the private parties, [i.e., citizens under Warren Act contract] or the parties on the government project?"

And Congressman Reeder answered:

"* * * if * * * private individuals [i.e. citizens under a Warren Act contract] come in and establish a right to water and use it on their lands, and then another unit of the government project is taken up, I am inclined to think that the next unit under the irrigation project would suffer the loss, **because ownership of water is regulated by benefical use** * * *."

Thereafter, without change, the Conference Bill was enacted into law as the Warren Act.

This legislative history shows that the Warren Act means precisely what it says: The Secretary may contract for the storage and carriage of water, but he may not contract for the sale or disposition of water. Rights to the use of water carried through Reclamation works under Warren Act contracts in no wise differ from rights to use of water carried through Reclamation works to "Project lands": In either case the right to the use of water is appurtenant to the land actually irrigated, and beneficial use is the basis, the measure and the limit of the right.

4. The Court of Claims' holding in respect of the Notice of Intent to Appropriate depends upon its interpretation of the Warren Act and does not present an independent question of State law.

The opinion of the court below indicates its conclusion that the 1906 and 1908 Notices of Intent to Appropriate did not extend to plaintiffs' lands. However; the opinion also makes clear that this conclusion is founded on the distinction between "Project lands" and "non-Project lands" which the court finds in the Warren Act. Insofar as the state law is concerned, it is not denied that the waters used by the plaintiffs for 26 years were throughout that period delivered to them by operation of the very irrigation works described in such Notices. The court does not suggest that there is anything in the Notices them-

selves, or any other requirement of *state* law, to exclude plaintiffs' lands from the scope thereof.

Thus it is inescapable that the Court of Claims' decision goes off on the proposition that the federal Warren Act empowers the Secretary to deliver water to "Warren-Act" lands (as opposed to "Project" lands), within the terms of the notice or permit prescribed by state law, without the citizens perfecting appropriative water rights by beneficial use of the water.

The Court of Claims has here decided an important question of federal law which has not been, but should be, settled by this Court. The decision of the Court of Claims is a cloud on the water rights of every farmer in the country irrigating his farm with water delivered under a Warren Act contract. The number of water right titles which might be affected by this holding iis only vaguely indicated in the finding of this Court in *Nebraska v. Wyoming*, 325 U.S. at 604, 605 note 10, that in one short reach of the North Platte River alone more than 90,000 acres of land in a number of irrigation districts are served under Warren Act contracts. Many hundreds of thousands more may be hereafter brought under production under such contracts, and it may be many years before the Court has another opportunity to resolve this question.

CONCLUSION

WHEREFORE the petitioners pray the Supreme Court to issue a Writ of Certiorari to the United States Court of Claims.

Respectfully submitted,

THEODORE ANDRESS
El Paso Nat'l Bank Building
El Paso, Texas

THURMAN ARNOLD
1229 19th Street, N.W.
Washington 6, D. C.

W. MORGAN HUNTER
Brown Building
Austin, Texas
Attorneys for Petitioners

Of Counsel:

ANDRESS, LIPSCOMB, PETICOLAS & FISK
El Paso, Texas

ARNOLD, FORTAS & PORTER
Washington, D. C.

POWELL, RAUHUT, McGINNIS & REAVLEY
Austin, Texas

October, 1958

APPENDIX

Act of June 17, 1902, c.1093, § 8, 32 Stat. 390; 43 U. S. C. §§ 383, 372:

> "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the water thereof, *provided, that* the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Act of February 21st, 1911, c. 141, §§ 1, 2, 36 Stat. 925 et seq; 43 U. S. C. §§ 523, 524:

> "Sec. 1. Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the im-

pounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under * * * the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *provided, however*, that water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works."

"Sec. 2. In carrying out the provisions of the reclamation law, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water-users' associations, corporations, entry-

men or wate. users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water-users' associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided*, That nothing contained in this or the preceding section shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

OPINION OF COURT BELOW

In the United States Court of Claims

No. 71-57

(Decided July 16, 1958)

J. B. BEAN, ET AL.

v.

THE UNITED STATES

On Defendant's Motion for Summary Judgment

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiffs sue for the taking by defendant of rights they claim in the waters of the Rio Grande River. Their properties lie in the Hudspeth County Conservation and Reclamation District No. 1 (hereinafter called Hudspeth District). This district adjoins the El Paso District to the north, which El Paso District is a part of defenndant's Rio Grande irrigation project.

The case comes before us on defendant's motion for summary judgment on the limited question as to whether or not the plaintiffs have any water rights

with respect to the waters of the Rio Grande River which have been taken by the defendant, acting through the Bureau of Reclamation of the Department of Interior. No dispute as to any material fact appears. Both parties have submitted exhibits for and against defendant's motion.

The decision of the case turns on what rights, if any, were acquired by plaintiffs under notices of appropriation of the waters of the Rio Grande filed by the Bureau of Reclamation in 1906 and 1908, and the subsequent delivery of water to plaintiffs by defendant and its beneficial use by plaintiffs.

The notices of appropriation were issued pursuant to the Act of February 25, 1905 (33 Stat. 814). By this Act Congress amended the Reclamation Act of 1902 so as to include within its terms a portion of the State of Texas bordering on the Rio Grande. The Act provided:

> That the provisions of the Reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a

dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory.

Following the passage of this Act, the United States, acting through the Reclamation Bureau, in 1906 filed with the Territorial Irrigation Engineer of New Mexico a notice of intention to appropriate 730,000 acre-feet of the water of the Rio Grande. This was pursuant to section 22 of Chapter 102 of of the 1905 Acts of the 36th Legislative Assembly of the Territory of New Mexico, authorizing the United States to appropriate such waters. The notice appears in a footnote[1] below.

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[1]Footnote follows:

Water Appropriations, Rio Grande Project
Department Of The Interior
United States Geological Survey
Reclamation Service

Carlsbad, New Mexico, Jan. 23, 1906

Mr. David L. White,
Territorial Irrigation Engineer,
Santa Fe, New Mexico.

Dear Sir:

The United States Reclamation Service, acting under authority of an act of Congress known as the Reclamation Act, approved June 17, 1902, (32 Stat., 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.

Section 22 of Chapter 102 of the laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico—an act entitled, "An Act Creating the Office of Territorial Irrigation Engineer, to Promote Irrigation Development and Conserve the Waters of New Mexico for

Later, in April 1908, the Bureau of Reclamation filed a further notice, notifying the Territorial Engineer that it intended to utilize "all the unappropriated water of the Rio Grande and its tributaries." In all material respects this notice is similar to the 1906 notice set forth in footnote 1 of this opinion. (Exhibit 3 to defendant's brief.)

Plaintiffs do not attack these notices, nor deny that they gave to the United States the right to appropri-

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the Irrigation of Lands and for other Purposes," approved March 16, 1905—reads as follows:

"Whenever the proper officers of the United States authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory, except as to such amount of the water described in such notice as may be formally re-leased in writing by an officer of the United States thereunto duly authorized."

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to wit:

A volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about 9 miles west of Engle, New Mexico, with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

It is, therefore, requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the Premises be otherwise protected as contemplated by the statute above cited.

Very truly yours,

B. M. Hall
Supervising Engineer.

ate the waters and to distribute them to lands in the Rio Grande project; plaintiffs' primary claim is that their lands were within the geographical area of the project authorized by the Act of 1905, and therefore, that they acquired a vested right to the waters they began to receive from the project on December 1, 1924, despite the terms of the contract under which the water was delivered to them. Hence, they say, the defendant took their propetry, that is, their water rights, in 1951, when it cut off their supply of water. For this plaintiffs say they are entitled to just compensation under the Fifth Amendment.

Defendant says plaintiffs' lands were not a part of the project, that it was within the discretion of the Secretary of the Interior to determine what lands were to be included in the project, that, in the exercise of this discretion, he did not include plaintiffs' land, and, therefore that the waters delivered to them were delivered, not pursuant to the notices of appropriation of 1906 and 1908 filed by the Bureau of Reclamation, but pursuant to the contracts of December 1, 1924, and April 27, 1951, entered into under the Warren Act of February 21, 1911 (36 Stat. 925), and that these contracts gave plaintiffs no vested rights to the use of the water.

It, of course, was within the discretion of the Secretary of the Interior to determine what lands were to be included within the project. The Act of 1905 makes this clear. Indeed, plaintiffs' brief admits this. On pages 21 and 22 they say:

> * * * In 1906 and 1908 and indeed, in 1924, the Reclamation Bureau had absolutely no obli-

> gation to deliver one drop of water through the Project irrigation works to the Hudspeth District. The Reclamation Bureau, as the initiator of the appropriation and the owner of the irrigation works, had the perfect right to select the specific lands to which it would deliver water for beneficial use. As late as 1924, the Reclamation Bureau had the perfect right to retain in storage or to dump back into the river every drop of water that could not be beneficially used on the tracts of land which the Reclamation Bureau selected to benefit. And had the Reclamation Bureau elected to deliver no water to the Hudspeth District, the Hudspeth landowners could never have acquired appropriative water rights under the Reclamation Notice of priority date 1906.

The Secretary did not make the Hudspeth lands a part of the project, as will clearly appear hereinafter.

The mere fact that plaintiffs' land might have been in the geographical area of the irrigation works authorized by the Act of 1905, *supra*, is of no moment. They can not benefit by the appropriation notices of 1906 and 1908 unless the Secretary of the Interior made their lands a part of the project for which the waters were appropriated, because, as we have said, he had the right to determine what lands were to be included within the project. In our opinion plaintiffs' case stands or falls depending upon whether or not their lands were a part of the Rio Grande project, because if they were not, plaintiffs' rights are to be determined by the Warren Act and by the above-mentioned contracts, and it is

clear under them that defendant had the right to cut off plaintiffs' supply of water, if it was needed on project lands. It is admitted that it was needed.

The Warren Act provided in part:

> Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation.
> * * *

From this it is clear that the Secretary was authorized to contract to deliver to nonproject lands only such water as is in excess of the needs from time to time of the project lands. He was authorized to contract to deliver this excess only with the understanding that the lands in the project should have the "first right" to the water. This means that if the project lands ever needed this water, they should have the "first right" to it, even though the Secretary may have contracted to deliver it to others.

The contract entered into on December 1, 1924, between the Hudspeth District and the Reclamation Bureau follows the Warren Act and makes clear that the rights of the landowners in the District are inferior to those in the project, and that when the project lands need the water, they are entitled to it, and landowners in the District cannot complain when it is given to them. Section 6 and 13 of the contract of December 1, 1924, provide:

> 6. The United States will deliver to the District at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservior. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal irrigation project. In consideration of such rental the District hereby relinquishes all right, title, interest, and claim to any and all waters of the Rio Grande, except as herein provided.
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> * * * * *
>
> Shortage in Water supply
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> 13. On account of drouth, inaccuracy in distribution or by reason of the requirements and use on the lands within the Rio Grande Federal Irrigation Project or by the use of municipalities supplied by the waters thereof, or other causes, there may be at times an insufficiency

of water for District lands but in no event shall any liability accrue against the United States or any of its officers, agents or employees for any damage, direct or indirect, arising therefrom, nor shall any charge provided for herein be reduced on account of any such shortage.

The contract of December 1, 1924, was amended on April 27, 1951, primarily to obviate the necessity of having to enter into supplementary contracts each year to fix the rental to be paid, but sections 6 and 13 of the 1924 contract were somewhat amended. As amended, they read:

6. The United States has delivered to the district during the irrigation season of 1950, and will deliver thereafter during each irrigation season, such water as may be available through the following distribution facilities or others which may be constructed and useful in the future: The Tornillo Canal; The Fabens Waste Channel; and Outlet of the Tornillo Drain. So far as it may do so without additional project expense to the United States, it will endeavor to make waters available hereunder, to the end that the district may fully utilize such waters for the irrigation of its lands. The availability, the choice of distribution facilities and the points of availability will be dependent upon operating conditions on the project, without the use of project storage. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use of waters on the Rio Grande Federal Irrigation Project for any purposes. The district hereby relinquishes to the

United States all right, title, interest and claim to any and all waters of the Rio Grande vested in the District as of December 1, 1924, except as herein provided.

13. On account of drouth, inaccuracy in distribution, or by reason of the requirements and use within the Rio Grande Irrigation Project or by reason of use of project water transferred from project water right lands, for municipal purposes, or other causes, there may be at times an insufficiency of water for district lands but in no event shall any liability accrue against the United States or any of its officers, agents or employees, for any damage direct or indirect arising therefrom, nor shall any charge provided for herein be reduced on account of any such shortage except as provided in Article 7 hereof.

* * * * *

If these contracts determine plaintiffs' rights, it is plain that defendant has deprived them of nothing that they were entitled to, because it is not disputed that during the severe drought in Texas this water was needed on project lands. When the drought was broken we understand deliveries of water to District lands were resumed.

We come back, then, to the question of whether or not the Hudspeth District lands were a part of the Rio Grande Project. We do not think they were.

In the first place, plaintiffs practically concede they were not in paragraph 15 of their petition. This reads:

The Rio Grande Project is a reclamation project of defendant and embraces Elephant Butte

> Dam and Reservoir and a great network of irrigation ditches and other works between Elephant Butte Dam and the El Paso-Hudspeth County line. All the irrigation works within Elephant Butte and El Paso Districts are operated by the Bureau of Reclamation as a part of the Rio Grande Project; these two districts having similar contracts with defendant with respect to operation and maintenance of such works. El Paso District and Elephant Butte District are sometimes herein referred to jointly as the "Project Districts," the lands within those two districts as "Project lands," and the owners thereof as "Project landowners."

In the second place, the contract between the Hudspeth District and the United States of December 1, 1924, in paragraph 2 recites: "Whereas the District contains an irrigable area of 20,014 acres, located in Texas, *just below the Rio Grande Federal Irrigation Project.*" (Italics ours.) This is a direct statement that the District lands are not a part of the project, to which plaintiffs assented. Also paragraphs 6 and 13 of the contract recognize that the District lands are outside the project. In section 6 it is recited: "The rental of water hereunder is secondary and inferior to the right to use w... " for any purpose on the lands of the Rio Grande Federal Irrigation Project." Then in section 13 it is recited: "On account of drought, inaccuracy in distribution or by reason of the requirements and use on the lands within the Rio Grande Federal Irrigation Project or by the use of municipalities supplied by the waters

thereof, or other causes, there may be at times an insufficiency of water for district lands. * * *."

Thus, in three places the Hudspeth District recognizes that the lands in it are not a part of the project lands.

Thirdly, contracts under the Reclamation Act of 1902, covering project lands, were entered into with Elephant Butte Irrigation District of New Mexico, covering lands in New Mexico, and with the El Paso County Water Improvement District, covering lands in El Paso County, Texas, and these are the only two contracts entered into according to the terms of the Reclamation Act of 1902, covering lands within the project.

Each of these contracts calls for assessments and levies against the landowners in the districts in order to repay to the United States the cost of the project, as required by the Reclamation Act of 1902, and by the Act of February 25, 1905, *supra*, and by the Reclamation Project Act of 1939 (53 Stat. 1193), as amended (59 Stat. 75). Each district assumed responsibility for the payment of a specified part thereof, determined according to the number of irrigable and cultivatable acres in each district.

The Reclamation Act of 1902 (32 Stat. 388) provides for the creation of a reclamation fund, and for the construction of irrigation projects, where in the judgment of the Secretary of the Interior such a project is practicable. In section 4 the Secretary is

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*The contracts with these two districts are too long to be set out in this opinion. They appear as exhibits 4 and 5 to the defendant's brief.

required to give notice of the lands to be irrigated and of the charges to be made per acre for the benefits to be received from the project, and it is then provided: "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably * * *." Section 6 provides for the transfer of the management and operation of the irrigation works to the owners of the lands irrigated, when the required charges have been paid on the major portion of the lands irrigated.

This particular project was authorized on the condition that "there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise * * *." (Act of February 25, 1905, *supra.*)

The above mentioned contracts with the Elephant Butte and El Paso Districts provided for assessments against the lands in the project in amounts estimated to be sufficient to return to the reclamation fund the cost of the project, and otherwise complied with the provisions of the above Acts. No such contract was entered into with the Hudspeth District. It did not assume liability for any part of the cost of the project, nor could the landowners in the District ever participate in the management and operation of the irrigation works. It agreed to pay a stipulated rental for the water to be furnished it, and this was the extent of its liability.

For these reasons we hold that the lands in the Hudspeth District were not a part of the Rio Grande Project, and that the landowners in the District acquired no rights under the notices of appropriation of 1906 and 1908 filed by the Reclamation Bureau.

The view we take is in accord with that of the Fifth Circuit Court of Appeals, in *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d 425, 431, note 6.[3]

From this it follows that plaintiffs' rights are governed by the contracts entered into between defendant and the Hudspeth District, unless plaintiffs' next position is correct.

2. Plaintiffs' next position is that, while the December 1, 1924, contract covered unused waters from the Rio Grande project, it did not apply to the seepage and drainage waters received from the El Paso District, and that plaintiffs acquired appropriative rights to these waters, which were taken by defendant in 1951. These waters once used to irrigate lands in the El Paso District, but which, after such use, seeped through the land and into drainage ditches within the El Paso District.

Plaintiffs say that for several years these waters, after use on lands in the El Paso District, were dumped into the bed of the Rio Grande River, and

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[3] While plaintiffs' efforts in that case, and *Miller v. Jennings* 243 F. 2d 157, to secure injunctive relief against the officials of the Bureau of Reclamation failed on jurisdictional grounds, the Court of Appeals in the *Robbins* case, *supra*, did state that it was its conclusion that plaintiff's lands were not, nor were they intended to be covered by the 1906 and 1908 notices.

that they diverted them from the river and used them beneficially on their lands. This, plaintiffs say, gave them certain rights to these waters, which has been taken by defendant.

Later, plaintiffs say, defendant connected these drainage ditches with the irrigation system of the Hudspeth District and have delivered these waters directly to the Hudspeth District.

It might be said, in passing, that a beneficial use of waters alone gives the user no vested right to them. Preceding the beneficial use there must have been a filing of a notice of intent to appropriate. The filing of a notice of intent is not shown. The permit #236 granted the predecessor of the Hudspeth District in 1917, and assigned to the Hudspeth District, is of no avail to plaintiffs because of non use. But we do not rest our decision on this ground, but, rather, on the more basic ground which we now state.

There can be no doubt under the authorities that the Reclamation Bureau, under its appropriations of 1906 and 1908, had the control and the right to prescribe the use of the seepage from lands within the project, as well as the original use of the waters. *Ide v. United States*, 263 U. S. 497; *Nebraska v. Wyoming*, 325 U. S. 589. Nor does the fact that for several years these seepage waters were dumped into the river bed show an abandonment of the defendant's rights to seepage waters in the future. It merely showed that the time defendant had no need for the waters; it did not show it abandoned its right to control the use of them, when it did have need of

them in the future. If there was no abandoment by defendant, its rights, as a prior appropriator, are superior to plaintiffs' rights.

As to the waters actually dumped into the river bed, of course defendant did abandon them, but that it did not thereby abandon its right to use these waters when needed in the future is shown by its resumption of control over them and the use of them on project lands and the later delivery of some of them to plaintiffs under contract. Furthermore, by the execution of this contract plaintiffs recognized that defendant had not abandoned its right to these waters and recognized its superior right to them.

Nor are plaintiffs correct in saying that the Warren Act contract of December 1, 1924, related only to unused waters, and not to seepage waters. Under that contract defendant agreed to deliver water to the Hudspeth District at the terminus of the Tornillo Main Canal. It is not said whether these waters were unused waters or seepage waters.

Then on April 27, 1951, the parties entered into an "amendatory contract," which in paragraph 2 recited:

> *Whereas*, the United States and the District entered into a contract on Decemebr 1, 1924, in pursuance of the Federal Reclamation Laws, hereinafter referred to as the contract of 1924, by the terms of which the United States rented to the District a portion of the *return flow, drainage and operational waste from the Rio Grande Project* for a fixed rental for the year 1925 and for a rental, thereafter determined annually; * * * [Italics ours.]

Thus plaintiffs recognize that the contract of December 1, 1924, did cover "return flow, drainage and operational waste" waters, or seepage.

The next two succeeding sections of the 1951 contracts recite events that affected the availability of water from the project for the use of the District, and then section 7 provides:

> *Whereas*, Project return flow, drainage and operational waste is available for district use, at the terminus of the Tornillo Main Canal of the project, or in the Fabens Waste Channel at the diversion point of Hudspeth Feeder No. 1, and form the Tornillo Drain outlet. * * *.

Thus return-flow or seepage waters are expressly covered in the 1951 contract.

From all the foregoing we cannot escape the conclusion that all of plaintiffs' rights are governed by the contracts of December 1, 1924, and April 27, 1951, and by them only. Under those contracts it is clear that defendant had the right to shut off the water from plaintiffs' lands, if it was needed on the lands of the project. This was done beginning some time in 1951, and was continued through the 1956 irrigation season.

3. Plaintiffs' claim of taking of the riparian rights of some of the plaintiffs cannot be considered, because it is clearly barred by the statute of limitations. When in 1908 defendant appropriated *all* the water of the Rio Grande above plaintiffs lands, their riparian rights were then destroyed. Their right of action, if any, then accrued.

The same is true of plaintiffs' claim that their rights were interfered with by the use by defendant of some of the water of the Rio Grande for the generation of electric power. The statute of limitations has long since barred any claim they may have had on this account.

But, independent of the statute, plaintiffs cannot complain of the diversion for the generation of electric power, unless plaintiffs first show they had a right to the waters by appropriation, and we have shown they do not have.

Defendant's motion for summary judgment is granted, and plaintiffs' petition will be dismissed.

It is so ordered.

Laramore, *Judge;* Madden, *Judge;* Littleton, *Judge* and Jones, *Chief Judge*, concur.